FILE COPY

Office - Supreme Court, U.
FILED
DEC 20 1946
CHARLES ELMORE CROPL
CLER

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 809

AL BISIGNANO, PETITIONER,

VS.

THE MUNICIPAL COURT OF THE CITY OF DES MOINES, IOWA, AND HARRY B. GRUND, ONE OF THE JUDGES THEREOF.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA AND BRIEF IN SUPPORT THEREOF.

FRANK J. COMFORT,
WALTER F. MALEY,
Counsel for Petitioner.

INDEX

AUTHORITIES

LIST OF CASES

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

AL BISIGNANO, PETITIONER,

VS.

THE MUNICIPAL COURT OF THE CITY OF DES MOINES, IOWA, AND HARRY B. GRUND, ONE OF THE JUDGES THEREOF.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Al Bisignano, a resident and citizen of the State of Iowa, respectfully petitions for a writ of certiorari to the Supreme Court of the State of Iowa to review its decision and judgment rendered on the 18th day of June, 1946 (R. 35), in *Bisignano* v. *Municipal Court of the City of Des Moines, Iowa, and Harry B. Grund, one of the Judges thereof, Respondent,* 23 N. W. 2d 523, not yet officially reported.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Proceedings in contempt were instituted by the Honorable Harry B. Grund, one of the Judges of the Municipal Court of the City of Des Moines, Iowa, predicated upon an assault made upon him by petitioner about 2:30 P. M. Saturday, January 12, 1946, in the Young Men's Christian Association Building in Des Moines, Iowa, located about one mile from the Municipal Court Building in said city. The Municipal Court was not then in session. As a result of the altercation the aforesaid Judge of the Municipal Court of the City of Des Moines, Iowa, caused an unverified Rule to Show Cause signed by himself and dated January 15, 1946, to be served upon petitioner commanding him to appear before said court on the 18th day of January, 1946 (R. 11).

At the time designated in the Rule to Show Cause petitioner and his counsel appeared before the respondent Judge in the Municipal Court in the City of Des Moines, Iowa, and the following proceedings were had (R. 11, 14). Respondent Judge, Harry B. Grund, read his unverified Rule to Show Cause; apology of petitioner to the court (R. 14); petitioner read his affidavit of explanation (R. 6 to 9). Petitioner made his motion to dismiss the proceedings for want of jurisdiction (R. 19). At the conclusion of the proceedings respondent Judge entered final judgment of contempt upon "such statements and circumstances as fully set out in the Rule to Show Cause are the facts and circumstances upon which the court is now acting in the premises" (R. 22). Petitioner was adjudged to be guilty of contempt of court and punished by commitment to the County jail for a period of six

months and fined in the sum of $500 and the court costs of the action (R. 22).

Availing himself of the only means afforded by Iowa law of having the judgment for contempt reviewed, petitioner on the day of judgment and while he was in the custody of the Bailiff of the Municipal Court applied, through his counsel, to the Supreme Court of the State of Iowa for a writ of certiorari. The writ was issued and the matter thereafter submitted to the full court upon printed briefs, arguments and oral argument, after which submission said judgment of contempt was affirmed (R. 35, 49). Petition for rehearing was thereafter filed by petitioner on July 17, 1946 (R. 49). He also filed amendment to his petition for rehearing on September 16, 1946 (R. 65). On September 23, 1946, the Supreme Court of Iowa entered its final order "rehearing denied" (R. 72).

B.

JURISDICTIONAL STATEMENT.

1. The jurisdiction of the Court is invoked under Section 237 (b) of the Judicial Code, as amended; 28 U. S. C., Section 344 (b). The judgment of the Supreme Court of the State of Iowa to be reviewed was entered on June 18, 1946 (R. 35). Rehearing was denied September 23, 1946 (R. 72). The jurisdiction of this Court is sustained by the following cases: *Collins* v. *Texas,* 223 U. S. 288; *Thomas* v. *Collins,* 323 U. S. 516; *Nye* v. *United States,* 313 U. S. 33; *Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida* (No. 473, October Term, 1945); *In re Michael* (decided October Term November 5, 1945); *Cook* v. *U. S.,* 267 U. S. 517.

2. The Supreme Court of the State of Iowa is the Court of last resort in Iowa of all matters within its juris-

diction. Its judgments are not reviewable by any other Iowa court. Section 4, Article V, Constitution of Iowa; Section 12822, Code of Iowa, 1939.

3. The constitutional questions were raised by petitioner throughout the proceedings. They were raised at the time of hearing before Respondent Judge by motion to dismiss (R. 19). They were properly presented before the Supreme Court of Iowa (R. 32 and 26). The opinion of the Supreme Court of Iowa (R. 39, 40, 48 and 49). Rehearing (R. 56, 57, 65 and 71).

4. The questions presented are substantial:

(a) The trial of petitioner was so conducted as to deprive him of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. There was no trial or right of trial awarded him in the constitutional sense. *Chambers* v. *Florida*, 309 U. S. 227; *Malinski* v. *New York*, 324 U. S. 401.

(b) A summary rejection of allegations supported by a sworn statement of petitioner and not denied by respondent followed by judgment involving fine and imprisonment where no evidence was introduced against petitioner and no trial had in the constitutional sense, constitute a denial of the right to fair trial and violate the Fourteenth Amendment to the Constitution of the United States. *Pyle* v. *Kansas*, 317 U. S. 213.

(c) In the light of Section 10 of Article I of the Constitution of Iowa which provides: "In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury." The denial of such constitutional right of trial by jury was violative of both the due process and equal protection clauses of the

Fourteenth Amendment to the Constitution of the United States.

(d) The Iowa Statute upon which petitioner's guilt was predicated, Section 12541, Code of Iowa, 1939, Section (1), providing: "Contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority." as administered, construed and justified by the Supreme Court of Iowa in the light of the geographical test laid down in the Nye, Michael, Bridges and Pennekamp cases above referred to violates the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States and presents a Federal question supporting a writ of certiorari from the Supreme Court of the United States to the Supreme Court of Iowa.

(e) The judgment was illegal, in excess of jurisdiction and constituted an infringement upon petitioner's freedom of speech and due process guaranteed him by the First and Fourteenth Amendments to the Federal Constitution.

(f) Where the record impels the conclusion that Respondent Judge in applying the law of contempt against Petitioner as his critic acted to satisfy personal grievances and was prejudiced and disqualified to act and took into consideration matters and things having no relation to the allegations set out in the Rule to Show Cause and acted as accuser, prosecutor, court and jury in determining Petitioner's guilt, Petitioner was denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. *Cook* v. *U. S.*, 267 U. S. 517, at 538.

(g) Where the Respondent Judge initiated proceedings in contempt and either invited or acquiesced in and

with the officers of a broadcasting station in the wiring of his court room and participate in the broadcasting of said proceeding at a later hour without the knowledge, consent or acquiescence of petitioner, it deprived Petitioner of a fair trial in the constitutional sense.

(h) The decisions of this Court determine the issuance of the writ in favor of Petitioner because his rights to due process under both the Constitution of Iowa and of the United States were overridden and violated by the Supreme Court of Iowa and the Municipal Court of the City of Des Moines, Iowa.

C.

THE QUESTIONS PRESENTED.

Whether Petitioner has been deprived of his right to a fair and impartial trial in the constitutional sense and been deprived of his right to freedom of speech, due process of law and the equal protection of the law guaranteed by the First and Fourteenth Amendments to the Constitution of the United States:

First, by applying the "causal connotation test" rather than the "geographical test" laid down in *Nye* v. *United States*, 313 U. S. 33.

Second, in illegally assuming jurisdiction determining Petitioner's guilt and imposing judgment upon him for alleged contemptuous conduct not committed toward the Court "while engaged in the discharge of a judicial duty tending to impair the respect due to its authority."

Third, by denying to Petitioner the right to a speedy and public trial by an impartial jury guaranteed him under the Constitution of Iowa and by refusal of the

courts of Iowa to interpret, construe and determine the applicability of that constitutional protection in Petitioner's behalf.

Fourth, whether such constitutional guarantees, both under the Constitution of Iowa and of the United States, have been infringed where the conviction for contempt and consequent punishment are predicated in whole or in part upon an alleged scandalizing of the accusing Judge absent a charge, a finding or proof that the alleged scandalizing was a means of intimidation in any particular whatever.

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The judgment of the Municipal Court of the City of Des Moines as affirmed by the Supreme Court of Iowa is not in accord with the decisions of this Court in *Chambers* v. *Florida*, 309 U. S. 227; *Malinski* v. *New York*, 324 U. S. 401; *Pyle* v. *Kansas*, 317 U. S. 213; *Thomas* v. *Collins*, 323 U. S. 516; *Cafeteria et al.* v. *Angelos*, 320 U. S. 293; *Cook* v. *U. S.*, 267 U. S. 517.

(a) The Respondent Judge and court below used the legal machinery to justify and vindicate personal feelings and vanity to the exclusion of judicial propriety and determination.

(b) The courts of Iowa adjudged Petitioner guilty of contumacious conduct under the causal connotation test as applied to contempt repudiated by this Court in affording constitutional protection in *Nye* v. *United States*, 313 U. S. 33.

(c) The decision denied a clear cut, well defined constitutional right to a speedy and public trial by an impartial jury in a cause involving the liberty of a citizen.

(d) The charge of contempt, while predicated in part upon an alleged assault and threats, was employed as fiction rather than fact in adjudging guilt and assessing punishment for an alleged scandalizing of the person of the Court.

2. The decision below was arbitrary and should be reviewed by this Court.

There was no contemptuous or insolent behavior toward any court while engaged in the discharge of a judicial duty, nor any words spoken nor act done, either in the immediate presence of the court or so near thereto as to interfere with the administration of justice.

The courts of Iowa have repudiated the appropriate principle of law laid down in the Nye decision. In the Bridges case this court unanimously held that merely criticizing or scandalizing a court is not punishable as contempt. Such a decision vitiates the entire judgment. *Thomas* v. *Collins*, 323 U. S. 516, 529.

The decision in this case is in further conflict with the Bridges and Pennekamp decisions in that the court below has taken no account of the standard applicable to the accusing Judge. No facts were presented to support a finding and no finding was made that what was said or done presented a danger of overthrowing the mind or will of a Judge of reasonable fortitude, let alone any element of coercion. There was in fact no contemptuous conduct toward a court at all.

3. The acts, words or conduct of petitioner did not create any clear and present danger of high imminence

to the administration of justice as the record fails to disclose that there was then pending before Respondent Judge any cases, the disposition of which could be influenced by Petitioner's conduct. *Nye* v. *U. S.*, 313 U. S. 33; *Bridges* v. *California*, 314 U. S. 252; *In re Michael* (decided October Term, November 5, 1945); and *Pennekamp* v. *Florida* (No. 473, October Term, 1945).

4. The decision of the Iowa Supreme Court in this cause is in conflict with the decision of this Court in *Bridges* v. *California; In re Michael* and *Nye* v. *Florida*, and with other Federal and State Court decisions adhering to the rule laid down in the Bridges case, and its action in affirming the conviction for contempt was wholly arbitrary and capricious and should be reviewed by this Court. *Wimberly* v. *U. S.*, (5th Cir.) 119 F. 2d 173; *Warring* v. *Colpoys*, (C. C. A. D. C.) 122 F. 2d 642; *McKee* v. *United States*, (6th Cir.) 126 F. 2d 470; *Klein* v. *U. S.*, 151 F. 2d 286; *United States* v. *Welch*, (3rd Cir.) 154 F. 2d 705; *Cook* v. *United States*, 267 U. S. 517; *In re Ellison*, 133 F. 2d 903.

Wherefore, your Petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the Supreme Court of the State of Iowa to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said Supreme Court of the State of Iowa be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

FRANN J. COMFORT,
WALTER F. MALEY,
Southern Surety Building,
Des Moines, Iowa,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

AL BISIGNANO, PETITIONER,

VS.

THE MUNICIPAL COURT OF THE CITY OF DES MOINES, IOWA, AND HARRY B. GRUND, ONE OF THE JUDGES THEREOF.

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI.

ARGUMENT.

I.

The trial of petitioner was so conducted as to deprive him of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. *Chambers* v. *Florida*, 309 U. S. 227; *Malinski* v. *New York*, 324 U. S. 401, because:

(a) No evidence was introduced against petitioner. Judge Grund was not sworn. The Rule to Show Cause was not verified as required by Iowa Code, Section 12545. The allegations of proof supported by the sworn statement of petitioner and not denied by the Respondent Court were summarily rejected. Judgment involving fine and imprisonment followed under pretense of a valid trial. *Pyle* v. *Kansas*, 317 U. S. 213.

(b) The constitutional right of trial by jury was denied him and thereby due process of law and the equal protection of the law under the Fourteenth Amendment, in the light of Section 10, of Article I, of the Constitution of Iowa, providing: "In all criminal prosecutions and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury." *Nye* v. *U. S.; In re Michael; Pennekamp* v. *Florida;* Sections 9 and 10, Article I, Constitution of Iowa; Section 12545, Code of Iowa, 1939; Amendments Six and Fourteen, Constitution of the United States. The Iowa Supreme Court has withheld interpretation of a constitutional provision in full force and effect in Iowa. The right is general and is guaranteed to all. It has neither been repealed, modified nor abridged. The opinions cited by the Court (R. 49), do not interpret or construe the constitutional provision invoked. Petitioner's request and demand for interpretation and construction of this statutory provision was denied (R. 57, 71). The Iowa Supreme Court has recognized the constitutional protection herein invoked insofar as criminal trials are concerned, by consistently saying that a defendant is always entitled to trial by jury in a criminal case and cannot waive his right of trial by jury. *State* v. *Berg,* (Iowa) 21 N. W. 2d 777; *State* v. *Douglas,* 96 Iowa 276; *State* v. *Carman,* 63 Iowa 130. The discrimination is self apparent.

(c) Respondent Judge invited or acquiesced in the wiring of his court room for broadcasting purposes without the knowledge, consent, or acquiescence of Petitioner, in contravention of Rule 53, New Federal Rules of Criminal Procedure, and in violation of universally accepted standards of judicial propriety, impartiality and decorum (R. 22, 28).

II.

The Rule to Show Cause resulting in the conviction of Petitioner (R. 21) and affirmed by the Supreme Court of Iowa (R. 35) nowhere alleged that the acts of Petitioner created any clear and present danger of high imminence to the fair and impartial administration of justice. Paragraph 1 of the warrant of commitment (R. 21) is unintelligible. The basis of conviction is found in the third paragraph of said warrant concluding in these words "and such statements and circumstances as fully set out in the Rule to Show Cause, are the facts and circumstances upon which the Court is now acting in the premises" (R. 22). The rule was not verified as required by Section 12545 of the Code of Iowa (R. 39). It was read in open court at the time of the hearing. No evidence under oath was introduced against Petitioner and the Court found that the basis of the conviction of Petitioner was what the Court itself had placed in the Rule to Show Cause by way of statements and allegations made therein. The decision therefore is in conflict with the decision of this Court in the *Bridges* and *Nye cases*, cited *supra*, and *Near* v. *Minnesota*, 283 U. S. 697.

III.

In the Nye, Bridges, *In re Michael* and Pennekamp cases this Court measured the power of all American

courts, both State and Federal. It said in substance that the possibility of disrespect for the judiciary as the result of criticism of a Judge is not such a substantive evil as will justify impairment of the constitutional right of freedom of speech and press, or justify denial of due process and equal protection of the law. A tendency to obstruct was not alleged in the Rule to Show Cause, nor any statement of clear and present danger of high imminence to the administration of justice. Moreover, no proof was offered tending to sustain such allegations had they been charged. The Supreme Court of Iowa (R. 39) attempted to breathe jurisdiction into this case by virtue of Subdivision 1 of Section 12541 of the Iowa Code as follows: "Contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority." Concededly, Respondent Judge was not acting as a court in the Health Department of the Y. M. C. A. in Des Moines. Of necessity he was not then and there engaged in the discharge of a judicial duty. It was under such a setting that Petitioner was convicted and his conviction affirmed by the Supreme Court of Iowa, notwithstanding the definition of the court in its true perspective in *Savin's case*, 139 U. S. 267, as follows: "The 'court' consists not of the judge, the court room, the jury or the jury room individually, but all of these combined. The court is present whenever any of its constituent parts is engaged in the prosecution of the business of the court according to law."

IV.

The record impels the conclusion that Respondent Judge in applying the law of contempt against Petitioner as his critic acted to satisfy personal grievances and was

prejudiced and disqualified to act and took into consideration matters and things having no relation to the allegations set out in the Rule to Show Cause and acted as accuser, prosecutor, court and jury in determining Petitioner's guilt. Under those circumstances it seems clear that Petitioner was denied due process of law in violation of the Fourteenth Amendment. *Cook* v. *U. S.*, 267 U. S. 517, at 538.

The Respondent Judge said prior to judgment: "It is too bad that the law does not provide for some other court to hear this kind of a case. It is too bad that the Judge who was one of the parties has to act not only as the court, but as a witness and attorney. Too bad there is so much personal matter which the court has to take into consideration" (R. 17).

A reading of the record clearly discloses that in imposing judgment Respondent Judge was greatly animated by the vindication of personal feelings, grievances and wounded vanity to the extent that it excluded all semblance of judicial propriety, dignity and determination. In passing on this phase of the matter the Iowa Supreme Court said: "He could have called in another judge and he might well have done so" (R. 48). The Supreme Court of Minnesota as late as July 5, 1946, in *Payne* v. *Lee*, reported in 24 N. W. 2d 259, unqualifiedly held that where personal differences prevail between the court and the condemnor, the judge was disqualified to act in the instant proceeding. *Cook* v. *U. S.*, 267 U. S. 517. See dissenting opinion of Justice Holmes in *Craig* v. *Hecht*, 263 U. S. at 281. There was a single sentence of imprisonment for scandalizing the judge of a court rather than contemptuous behavior toward any court while engaged in the discharge of a judicial duty, and the entire judgment is vitiated by the penalty for scandalizing either a judge of a

court or the court itself. *Thomas* v. *Collins,* 323 U. S. 516, 529.

By affirming the judgment of the Respondent Judge as a court in this case, the Supreme Court of Iowa have repudiated the appropriate rule of law laid down in the Nye, Bridges and Pennekamp decisions.

V.

The decisions of this Court determine the issuance of the writ in favor of Petitioner because both under the Constitution and Statutes of the State of Iowa and of the United States, particularly the due process clause of the Fourteenth Amendment, the rights of Petitioner were overridden and violated by both the Supreme Court of the State of Iowa and the Municipal Court of the City of Des Moines, Iowa, and if the orders of said courts are permitted to stand, he will be unjustly and illegally imprisoned without jurisdiction and deprived of his liberty without legal cause or right. Petitioner has exhausted all remedies available to him for the redress of his wrongs under the laws and in the courts of Iowa and is without other remedy than review by certiorari of the final judgment of the Supreme Court of Iowa, the highest court of last resort of that state. Section 4, Article V, Constitution of Iowa; Section 12822, Code of Iowa, 1939.

The words, acts or conduct of Petitioner would not, or could not, create any clear and present danger of high imminence to the administration of justice, because the record fails to disclose that there was then pending before Respondent Judge any cases, the disposition of which could be influenced directly or indirectly, by Petitioner's word or deed.

Petitioner challenged production of proof of any case pending against him (R. 14, 20). His challenge went

unanswered. The opinion of the Supreme Court in effect concedes this claim (R. 47).

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANN J. COMFORT,
WALTER F. MALEY,
Southern Surety Building,
Des Moines, Iowa,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 899

AL BISIGNANO, *Petitioner*,

vs.

THE MUNICIPAL COURT OF THE CITY OF DES MOINES, IOWA, AND HARRY B. GRUNE, ONE OF THE JUDGES THEREOF, *Respondents*.

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA AND BRIEF IN SUPPORT THEREOF.

Howard L. Bunn,
Counsel for Respondents,
505 Central National Bldg.,
Des Moines, Iowa.

Paul G. James,
510-514 Empire Bldg.,
Des Moines, Iowa.
Emmert, James, Needham & Lundgren,
Of Counsel.

INDEX.

AUTHORITIES.

LIST OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 809

AL BISIGNANO, *Petitioner,*

vs.

THE MUNICIPAL COURT OF THE CITY OF DES MOINES, IOWA, AND HARRY B. GRUND, ONE OF THE JUDGES THEREOF, *Respondents.*

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents respectfully pray the Court to deny Petitioner's petition for a Writ of Certiorari to the Supreme Court of the State of Iowa seeking a review of the unanimous decision and judgment of that Court rendered on June 18, 1946, in Bisignano vs. Municipal Court of the City of Des Moines, Iowa, and Harry B. Grund one of the Judges thereof, 23 N. W. (2) 523, not yet officially reported.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The record shows that the respondent, a Judge of the Municipal Court of the City of Des Moines, which is a court of record, (Section 602.13, 1946 Code of Iowa, see Appendix), issued a search warrant on December 15, 1945, directed against "Babe's Tavern" in Des Moines; that a large quantity of illegal liquor was seized, and condemnation and other related proceedings were instituted before respondent Judge in said court, which were pending and set for hearing January 14, 1946. The petitioner is commonly known as "Babe" Bisignano.

On January 12, 1946, the petitioner met the respondent Judge in the Des Moines Y. M. C. A., grabbed, assaulted and shook him, and said: "You God damned son of a bitch! You son of a bitch! What do you mean pushing people around?" (R. 2) He was angry, and he continued to use vile, foul and obscene language toward respondent Judge, saying among other things: "You gave them a warrant! You are in cahoots with the bastards! You cannot push me around and get by with it! I have too much on you! You got rich taking money from people to keep them out of the army. I ought to kill you!" (R. 3)

Respondent Judge did not fight back or quarrel with petitioner, who is an ex-prize fighter and wrestler.

Later on the same day, petitioner and counsel, Mr. Frank Comfort, called on respondent Judge at the office of the Draft Board, of which Board Judge Grund was Chairman, and petitioner threatened the respondent Judge with unfavorable publicity concerning accusations of accepting bribes, and said: "I have got it on you. I can put you behind bars!" (R. 17)

Still later on the same day, the petitioner again returned to the Draft Board office, renewed the accusations and threats previously made, and demanded to know why the respondent Judge had not "tipped him off" that a warrant had been issued to search his premises. He said as he left: "Well, if you will forget about this, I will forget what I know about you!" (R. 3)

Respondent desires to correct the statement by Petitioner:—"The Municipal Court was not then in session" (p. 2. Petitioner's Summary). The opinion of the Supreme Court of Iowa declared: "The Municipal Court is always in session. Code Sec. 10663." (R. 44) See Appendix, *Code of Iowa*, 1946, Section 602.22.

Thereafter the petitioner was cited for contempt. Before the hearing, his counsel proposed to respondent Judge that if some *assurance* were given that "Babe" would get off with a fine, that an affidavit apologizing was all that would be filed, but if the "Babe" *didn't get* that *assurance* an affidavit would be filed making "a whole mess" of both "Babe" and the respondent Judge. (R. 18-19)

In response to the citation, petitioner appeared in person and by counsel. No request was made for a jury trial. No objection was made to the Judge. Petitioner was permitted to offer all the evidence he desired. He took the witness stand and again committed contempt of court by reading into the record the defamatory charges he had previously threatened to make, accusing the respondent of accepting bribes. (R. 6 to 9, R. 17, first line)

At the close of all the evidence, and after petitioner "rested", his counsel made the following motion—the only motion or objection made:

"At this time the defendant Al Bisignano moves the Court to dismiss the contempt proceeding for the reason that this Court is without jurisdiction to entertain a contempt proceedings, and is without jurisdiction to impose any penalty, and under the decisions this matter should be dismissed." (R. 19) This motion was overruled.

Petitioner was found guilty of contempt, and was fined $500.00, and sentenced to jail for six months,—as authorized by Iowa Statute. Sec. 665.4, Code of Iowa, 1946. See Appendix.

From this sentence, counsel petitioned the Supreme Court of Iowa for a writ of certiorari, (R. 1-10) and upon Hearing, the Supreme Court by unanimous decision annulled the writ. (R. 35-49) Rule of Civil Procedure No. 316, Code of Iowa, 1946. (See Appendix) A petition for rehearing was then filed, and argued, and was unanimously denied.

II.

PROPOSITIONS RELIED UPON FOR DENIAL OF WRIT.

A.

This court will not review the action of the court of last resort of a state in the interpretation and application of a state statute on contempt of court, and the substantive law applicable thereto.

B.

No constitutional or federal question arising under the First, Sixth or Fourteenth Amendments to the Constitution of the United States was properly raised or preserved in either the trial court or the court of last resort of the State of Iowa.

C.

The constitutional rights of the Petitioner, now asserted, were not violated by the trial on charges of contempt of court.

III.

JURISDICTIONAL PROPOSITIONS AND BRIEF.

A.

No constitutional or federal question was raised or presented at any time, or in any manner, upon the trial of this cause; hence no such question was properly preserved for the state court of last resort, or for this court. *Talerico vs. City of Davenport*, 215 Iowa 186, 244 N.W. 750; *State vs. Johnson*, 204 Iowa 150, 214 N.W. 594; *Morrison vs. Watson*, 154 U.S. 111, 14 S. Ct. 995, 38 L. Ed. 927.

B.

The only objection to the proceedings made at the trial was by motion to dismiss, as follows: "At this time the defendant Al Bisignano moves the court to dismiss the contempt proceeding for the reason that this court is without jurisdiction to entertain a contempt proceeding, and is without jurisdiction to impose any penalty, and under the decisions this matter should be dismissed." (R. 19) This motion was wholly insufficient to raise any constitutional or federal question. *State vs. Johnson*, 204 Iowa 150, 214 N.W. 594; *Morrison vs. Watson*, 154 U.S. 111, 14 S. Ct. 995, 38 L. Ed. 927.

C.

No constitutional or federal question was raised or presented to the state court of last resort in the petition for a writ of certiorari presented to that court. (R. 1-6)

(1) The petition for a writ, alleging only that respondent Court was "without jurisdiction", that it acted in "excess of jurisdiction" and "illegally", (R. 5) raised no constitutional or federal question. No question can be

raised in the Supreme Court not properly raised in the trial court. *Winneshiek Co. State Bank vs. District Court*, 198 Iowa 524, 197 N.W. 898.

(2) No constitutional or federal question can be raised in the Supreme Court of Iowa unless clearly and specifically stated in the petition for a writ. An omnibus assignment of error is insufficient. *Rawleigh Medical Co. vs. Bane*, 218 Iowa 154, 254 N.W. 18; *State vs. Lambertti*, 204 Iowa 670, 215 N.W. 752.

D.

No question not raised in the original submission to the state court of last resort can be raised upon a petition for rehearing before that court. *Dailey vs. Standard Oil Co.*, 213 Iowa 244, 235 N.W. 756.

E.

This court will not review the action of the court of last resort of a state in the interpretation and application of state statutes or substantive law. *Owens vs. Dancy*, Tenth C.C.A., 36 Fed. 882, (contempt case, certiorari denied), 281 U.S. 746, 50 S. Ct. 351; *Gasquet vs. Lampeyre*, 242 U.S. 367, 37 S. Ct. 165, 61 L. Ed. 367; *Newport Light Company vs. City of Newport*, 14 S. Ct. 429, 151 U.S. 527, 38 L. Ed. 259; *Hibben vs. Smith*, 191 U.S. 310, 48 L. Ed. 195, 201; *Home for Incurables vs. City of New York*, 187 U.S. 155, 47 L. Ed. 117; *Southern Pacific Company vs. Arizona*, 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515; *Allen-Bradley Local, etc. vs. Wis. Emp. Ref. Board*, 315 U.S. 740, 86 L. Ed. 1154, 62 S. Ct. 820.

F.

Assaults committed upon the person of a judge by reason of his performance of a judicial act, whether on or

off the premises of the court buildings, are punishable as contempt of court under state laws. *Weldon vs. State,* 150 Ark. 407, 234 S.W. 466, 18 A.L.R. 202; *Turquette vs. State,* 174 Ark. 875, 298 S.W. 15, 55 A.L.R. 1226; *Ex Parte McCown,* 139 N.C. 95, 51 S.E. 957.

(1) States may construe and apply their own laws and statutes pertaining to contempt of court. *Owens vs. Dancy,* 36 Fed. 882, (certiorari denied), 281 U.S. 746, 50 S. Ct. 351.

(2) The *Nye* case, and others cited by petitioner, construe a federal statute; the Legislature of the State of Iowa, by statute, as construed by the Supreme Court of Iowa, protects judges, either on or off the premises of the court building. Code of Iowa, 1946, Section 665.2; 1939 Iowa Code, Sec. 12541, see Appendix; *Harding vs. McCullough,* 19 N.W. 2d 613; *Field vs. Thornell, Judge,* 106 Iowa 7, 75 N.W. 685; *Bisignano vs. Grund,* (Iowa) 23 N.W. 2d 523.

G.

Trial by Jury is not required as "due process of law" under the Constitution of the United States.

(1) There is no constitutional right to a trial by jury in a contempt case. *State vs. Baker,* 222 Iowa 903, 905, 270 N.W. 359; *Jones vs. Mould, Judge,* 151 Iowa 599, 605, 132 N.W. 45; *Drady vs. District Court,* 126 Iowa 345, 352, 253, 102 N.W. 115; *In re Debs, et al.,* 158 U.S. 564, 594, 15 S. Ct. 900.

(2) In matters of contempt of court a jury trial is not required by "due process of law". *Interstate Commerce Commission vs. Brimson,* 154 U.S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047. No right to a jury trial existed; no request was made for a jury trial; no objecton was made to the procedure adopted and followed,—hence, no complaint can now be made on that ground. *State vs. Berg,* (Iowa) 21 N.W. (2d) 777.

IV.

ARGUMENT.

The salient facts in this case are not controverted. Petitioner committed an assault and battery upon the respondent Judge, because of his performance of a judicial act. The resulting condemnation of liquor case was then pending in said court, and the final decision in that case occurred subsequent to the filing of the petition in the Supreme Court of Iowa.

Petitioner appeared by counsel in response to the citation issued. He tried his case. He made no motion for a change of venue, no objection to the qualifications of the presiding Judge, no objection to the procedure followed, no demand for a jury trial.

At the conclusion of the hearing, his counsel made a motion—hereinbefore referred to, and shown in the record. This motion raised no federal and no constitutional question. Hence, no such question could be relied upon in the Supreme Court of Iowa.

Petitioner then applied to the Supreme Court of Iowa for a writ of certiorari. That petition raised no federal and no constitutional question. Even had it done so—under the Iowa law—the Supreme Court of Iowa was not obligated to recognize any such question, as there was a complete failure to raise any such question in the lower court. But the petition for the writ wholly failed to raise any such proposition before the Supreme Court of Iowa.

Petitioner presented his cause to the Supreme Court of Iowa by written Brief and Argument and by oral argument, as well. The Supreme Court of Iowa by unanimous opinion denied the petitioner relief. No federal or constitutional question was presented.

Petitioner then filed a petition for rehearing. Under the laws of Iowa, and the rules of the Supreme Court of

Iowa, no new questions can be presented in a petition for rehearing. Petitioner—for the first time—in his petition for rehearing, attempted to raise the federal questions now sought to be presented to the Supreme Court of the United States. The petition for rehearing was denied—unanimously.

The Supreme Court of the United States has repeatedly and continuously recognized the traditional sovereignty of the respective states in the enactment, interpretation and enforcement of their respective local laws, particularly those designed to protect the health, morals, and welfare of the people. Even where under the Constitution Congress is given the power to enact laws superseding state laws—(as in the case of Interstate Commerce)—"Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested." *Southern Pacific Co. vs. Arizona,* 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515. Mr. Justice Douglas declared in *Allen-Bradley Local, etc. vs. Wis. Emp. Ref. Board,* 315 U.S. 740, 86 L. Ed. 1154, 62 S. Ct. 820: "Furthermore, this court has long insisted that an intention of Congress to exclude states from exerting their police power must be clearly manifested."

There is neither Congressional power, nor is there any intention manifested by the Congress, to dictate to any state what acts shall or shall not be punishable as contempts of court. Federal statutes on the subject, and decisions interpreting such statutes, are not controlling, or applicable, to the interpretation and enforcement of dissimilar state statutes by the state courts.

It is thus conclusively evident that the petitioner wholly failed in both the trial court, and in the Supreme Court of Iowa, to either properly or timely raise any federal or constitutional question.

The questions now sought to be raised for the first time in this record, are not substantial. Never has this, or any other court, held that in the absence of statutory requirement, a trial by jury is required—even though demanded—(which was not done in this instance) in a contempt case. And never has this court invaded the province and authority of the state Court of last resort of any state to deny it the power and authority to define, interpret, and enforce its statutory or substantive laws pertaining to contempt of court.

The legislature of the State of Iowa, and the Supreme Court of the State of Iowa, have defined contempt of court, and prescribed the procedure (not objected to) and the penalty. The Congress of the United States has defined contempt of the Federal courts, prescribed the procedure, and the penalty. That different definitions and interpretations, as indicated in the *Nye* case should result under different statutes is natural, and to be expected. Uniform laws are not universal. Diversity is the sustaining power of our union. Diversity is not synonymous with unconstitutionality.

V.

CONCLUSION.

The contempt cases cited by petitioner all involve either freedom of the press, the right of free speech, or the interpretation and application of the federal statute. No case cited by petitioner involves the interpretation, construction or enforcement of state statutes on contempt of court. No case cited by petitioner involves deliberate assault and battery upon a state Judge by reason of his performance of a judicial act. No case cited by petitioner supports the right to a trial by jury in a contempt case. And no case cited by petitioner supports the right to raise

a constitutional or federal question not raised in the trial court, or in the petition for a writ addressed to the State Court of last resort.

Respondent respectfully prays that the petition be denied.

Respectfully submitted,
HOWARD L. BUMP,
Attorney for Respondents,
Des Moines, Iowa.

PAUL G. JAMES,
of Counsel,
Des Moines, Iowa.

APPENDIX.

CODE OF IOWA, 1946.

Section 602.13:

Court of record-records. The court shall be a court of record, and shall have a seal with the words 'Municipal court of (inserting name of city), Iowa" thereon. The records of the court shall be kept in substantially the same form and manner as the records of the district court. (SS15, #694-c25; C24, 27, 31, 35, 39, #10654)

Section 602.22:

Sessions to be continuous—absence of judge. There shall be no terms of court, and the court shall be open for business twelve months of the year. There shall always be one judge present each day to hold court and issue such writs and orders as are required. In case of inability of any judge to act, any other judge of any municipal or district court may hold court during such inability; or the governor may appoint a judge to hold court during such inability, who shall have the same qualifications and shall be paid the same salary and in the same manner as the regular judge. (SS15, ##694-c16,-c17; C24, 27, 31, 35, 39, #10663)

Section 665.2.—Sections 1, 2 and 6:

Acts constituting contempt. The following acts or omissions are contempts, and are punishable as such by any of the courts of this state, or by any judicial officer, including justices of the peace, acting in the discharge of an official duty, as hereinafter provided:

1. Contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority.

2. Any willful disturbance calculated to interrupt the due course of its official proceedings.

6. Any other act or omission specially declared a contempt by law. (C51, #1598; R60, #2688; C73, #3491; C97, #4460; C24, 27, 31, 35, 39, #12541)

Section 665.4:

Punishment. The punishment for contempt, where not otherwise specifically provided, shall be:

1. In the supreme court, by a fine not exceeding one thousand dollars or by imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment.

2. In all other courts of record, by a fine not exceeding five hundred dollars or by imprisonment in a county jail not exceeding six months, or by both such fine and imprisonment.

3. In all other courts, by a fine not exceeding ten dollars. (C51, #1600; R60, #2690; C73, #3493; C97, #4462; C24, 27, 31, 35, 39, #12543)

Rule of Civil Procedure No. 316:

Judgment limited. Unless otherwise specially provided by statute, the judgment on certiorari shall be limited to sustaining the proceedings below, or annulling the same wholly or in part, to the extent that they were illegal or in excess of jurisdiction, and prescribing the manner in which either party may proceed further, nor shall such judgment substitute a different or amended decree or order for that being reviewed. (Report 1943)

Section 12464, Code 1939, superseded by R.C.P. 316.